

BOOK REVIEWS

PSYCHOANALYTICAL JURISPRUDENCE: ON ETHICS, AESTHETICS, AND "LAW"—ON CRIME, TORT, AND PROCEDURE. BY ALBERT A. EHRENZWEIG. Leiden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications, Inc., 1971. Pp. 395. f. 60.00 (\$19.40).

Al Katz†

Once psychoanalysis brought to light the many irrational and infantile tendencies behind our cultural values, those values were at once deemed remnants of infantile attitudes unworthy of a truly rational 'adult.' Thus . . . beliefs in a personal God and political monarchy were condemned as infantile. But are not all cultural values in the last resort 'irrational' and 'infantile'? It is no longer necessary to criticize the 'Brave new world' of the last decades when Logical Positivism disestablished metaphysical values, and analytical jurisprudence discarded as unscientific the concepts of justice and natural law.

Today the self destructive game of 'debunking' has become somewhat old-fashioned and appears to be not quite so brave as it first looked; we are busy reintegrating our cultural values.¹

The relevance of psychoanalytic theory to legal problems, doctrines or the macro-legal interests called jurisprudence is problematic to many students in both fields of humanistic study. Very little has been done by way of cross-application, and there are certainly no more than a score of intellectuals with any interest in doing such work. Professor Ehrenzweig is by all accounts the elder statesman of this pack (hardly a group), and so one looks to him for a proposal which will provide structure and direction, or at least for some indication of where the most fruitful points of entry lie. Unfortunately, I don't believe this book provides the needed model. In this review I will discuss three aspects of *Psychoanalytic Jurisprudence*: the treatment of major jurisprudential issues from a psychoanalytic perspective; the relevance of psychoanalytic study of aesthetics to psychoanalytic study of law; and the examination of major criminal law issues from a psychoanalytic perspective.

† Associate Professor of Law, State University of New York, Buffalo. B.S. 1963, Temple University; J.D. 1966, LL.M. 1967, University of California, Berkeley.

¹ ANTON EHRENZWEIG, *THE PSYCHOANALYSIS OF ARTISTIC VISION AND HEARING* 265 (1965).

I. JURISPRUDENCE FROM A PSYCHOANALYTICAL PERSPECTIVE

One major task Professor Ehrenzweig sets for himself is to resolve or explain the classical debates between Natural Law and Positivism; the fundamental differences between civil law and common law; the distinction between code method and case method. Since all three of these matters have been of absorbing intellectual interest to academic lawyers and legal philosophers, resolution of these disputes would indeed be a major contribution to legal theory. But in terms of this goal Professor Ehrenzweig's psychoanalytic jurisprudence was doomed at the outset.

Professor Ehrenzweig approaches his subject by setting forth schematically the rational foci of these disputes as they appear in the literature. He concludes, in each instance, that there is no "rational" difference in the opposing positions. This being the case, he argues, continued interest in the disputed issues is explicable only as a matter of psychological drive, orientation or necessity.²

The problem with this approach can be illustrated best in the following way. Suppose a person suffers from severe abdominal pain and consults a physician for treatment. If examination of the patient reveals a somatic disturbance the physician might prescribe a somatic treatment regime. In the event the physician finds no somatic disturbance he might conclude that the pain is an hysterical symptom and prescribe a psychological treatment regime. But a physician who finds a somatic disturbance might conclude that the disturbance was produced by psychological stress. He might then prescribe a treatment for the somatic symptom and a treatment for the stress.

Professor Ehrenzweig's examination of the jurisprudential issues with which he is concerned leads him to conclude that the "patient" is not suffering from any somatic disturbance, *i.e.*, there is no "real" issue, hence that the intellectual pain is an hysterical symptom explicable on psychological grounds alone. Insofar as a major purpose of his book is to demonstrate the applicability of psychoanalytic theory to legal concerns, this diagnosis tends to imply that if "real" (rational) differences separated the opposing schools of thought, psychoanalytic theory would be either irrelevant or of severely limited utility. Hence the case for psychoanalytic jurisprudence depends on the absence of rational distinctions in the existing literature.

I think this approach is wrong for two reasons. First, it imports a psychological strategy from the therapeutic context which may have

² Professor Ehrenzweig refers to the Hart-Fuller debate as "[a] typical controversy" and states:

I have suggested that the 'schools of jurisprudence' are distinguishable only by their varying emotional emphasis upon either the positive character of all natural law . . . or the natural character of all positive law The following glance at the dialogue on law and morals between Hart, the 'positivist,' and Fuller, the 'naturalist,' confirms this conclusion

A. EHRENZWEIG, *PSYCHOANALYTICAL JURISPRUDENCE* § 44 (1971).

no relevance outside of that context. Second, it involves Professor Ehrenzweig in a Cartesian duality which has been problematic in psychoanalytic theory. I shall deal with these in turn.

A. *The Psychological Strategy*

Imagine a patient visiting a psychotherapist for the first time. The patient says: "My husband is an awful person. He stays away for days, gives me no money for food, drinks constantly and beats the children. I don't know what to do." If the therapist takes this definition of the problem by the patient at face value the intake interview is at an end. The patient has come to the wrong service professional. What she seems to need is a lawyer, social service person, or the police. But she said nothing about her own emotional state. So far the problem *as articulated* is in the real world. The psychotherapist's professional competence is not useful until the patient agrees to a definition of the problem which says something like: "I am unable to cope with the situation, and my difficulty in coping is more serious than one would expect given the nature of the reality situation."³

Professor Ehrenzweig approaches jurisprudence in a similar manner. That is, the application of psychoanalytic theory to the problems of jurisprudence is quite impossible until one establishes that the difficulties experienced in coping with problems of legal institutions through application of jurisprudential concepts are beyond what one would expect given a "normal" perception of reality. Consequently, the issue becomes whether the difficulties experienced in coping with reality are attributable to the reality or to coping capacity. In the clinical psychotherapeutic situation one at least has a patient who has implicitly defined the problem as his own by seeking out a psychotherapist rather than, say, a lawyer. One has the additional advantage of being able to interact with the patient until he explicitly agrees to define the problem as one of coping capacity as it interacts with external reality. But in the application of psychoanalytic concepts to jurisprudence one has neither of these advantages. Hence if that task requires a preliminary finding that reality does not sufficiently account for the jurisprudential difficulties experienced, one is bound to establish that finding by an explication of reality. This is what Professor Ehrenzweig has attempted to do by showing the absence of real differences between the disputants in the various debates. The problem, of course, is that perceptions of reality differ. Whether one accepts Professor Ehrenzweig's explication depends on the extent to which his rational account of the reality described is persuasive. But if the reality were as clear as Professor Ehrenzweig seems to think it is, I doubt that the

³ For a more thorough analysis of the intake interview see Scheff, *Negotiating Reality: Notes on Power in the Assessment of Responsibility*, 16 J. Soc. Prob. 3 (1968).

various issues would have survived long enough for Professor Ehrenzweig to take them seriously now.⁴

B. *Introduction of the Cartesian Duality*

My second problem with Professor Ehrenzweig's approach is that it implicitly assumes that problems in the reality context and psychological problems do not coexist and interact in time and space. Or, to put the matter in terms of the therapeutic metaphor, either the patient's husband is a bastard or the patient's emotional state is confused but not both. Professor Ehrenzweig's Cartesian assumption⁵ is that cognitive and affective behavior involve distinct human processes. Reason and emotion are independent of each other. Hence where reason serves to explain differences of perception one may conclude that the differences have been objectively verified and emotion has played no relevant part in the process. The relevance of this assumption to the core of psychoanalytic theory can be sketched as follows.

Freud originally constructed his model of the mind on the basis of a biological paradigm. Postulating the Pleasure Principle as the only innate human drive made it impossible, without more, to account adequately for human adaptation. That is, in order to avoid "unpleasure" human beings had to be able to recognize, predict and choose. The Pleasure Principle alone would not account for this capacity. Freud postulated the Reality Principle as that which enabled human beings to delay gratification and thereby "safeguard" the Pleasure Principle.⁶ But subsequent clinical experience cast doubt on this formulation. In the repetition compulsion Freud realized he had come upon a human tendency to repeat experiences which produced "unpleasure." Since the Pleasure/Reality Principles were based on the necessity of biological adaptation they had to account for *all* forms of human behavior, and the repetition compulsion did not fit.

In *Beyond the Pleasure Principle*⁷ Freud attempted to resolve this dilemma in the following way. "Repetition" means to go back; to go back all the way is to go back before life, to become inanimate, to be dead. With the Death Instinct (also called "primary masochism") Freud attempted to salvage his evolutionary model. However, the Death Instinct is inherently implausible as a central concept within an evolutionary model, for if human beings are driven to their own destruction

⁴ Cf. Crews, Book Review, 11 N.Y. REV. OF BOOKS, Apr. 24, 1969, at 29, reviewing, among others, L. FEUER, *THE CONFLICT OF GENERATIONS: THE CHARACTER AND SIGNIFICANCE OF STUDENT MOVEMENTS* (1969).

⁵ *Res cogitans, res extensa.*

⁶ See S. FREUD, *Formulations Regarding the Two Principles in Mental Functioning* (1911), in 4 COLLECTED PAPERS 13 (1959).

⁷ S. FREUD, *BEYOND THE PLEASURE PRINCIPLE* (1922).

they do not have an enormous capacity to survive by adaptation.⁸ Furthermore, in Freud's original formulation the adaptive tendencies of the Pleasure Principle would lead to the emergence of the ego from the id. With the introduction of the Death Instinct this was no longer possible.

Modern ego psychology, following Hartmann, attempts to solve the latter problem by postulating autonomous ego functions which are not derived from the id.⁹ Further, Hartmann and others have rejected the Death Instinct in favor of the notion of aggression.¹⁰ This aggression, which is postulated as a drive, is "neutralized" and made harmless to the individual by externalization. However, the notion of aggression as a drive presents a serious problem. We are normally accustomed to calling "aggressive" human acts which have certain consequences. Such consequences are a necessary but not sufficient condition. It is also necessary that the "aggressive" acts in some way be calculated to produce the consequences. It is not aggressive to throw a switch intending to activate a light bulb, but it is aggressive to throw a switch in order to set off a bomb. If this notion of aggression is accepted, then it is clear that human aggression must involve cognition.¹¹ The question, then, is whether human aggression can involve cognition and also be considered a drive or instinct. With this question we can see the relevance of duality in psychoanalytic theory in general and in its application to human endeavors such as jurisprudence in particular. In animals, drives as well as the *objects* of the drives are predetermined. But in human beings, only the drives and not the objects of such drives are determined. Consequently, aggression cannot be postulated as a drive to the extent that it essentially involves cognition. How, then, do people relate what is inside to what is outside? How do they distinguish subjective from objective? Self from other?¹²

I do not propose to resolve this question. The purpose of this digression is only to establish (1) that Professor Ehrenzweig adheres to a cognitive-affective distinction, (2) that the distinction is problematic at the core of psychoanalytic theory, and (3) that the issue fundamentally involves the concept of aggression as a human drive. I will mention again the role aggression plays in Professor Ehrenzweig's theory later in this Review, but it is important to note here at least one

⁸ *But cf.* A. EHRENZWEIG, *supra* note 2, § 156: "And we hope yet to overcome the psychoanalysts' emotional division regarding the death instinct. This division, Anton Ehrenzweig once suggested to me, resembles that between positivists and adherents of natural law with its deep roots in the anxiety aroused by any tampering with the unconscious."

⁹ See H. HARTMANN, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTION* (1958).

¹⁰ See Hartmann, Kris & Loewenstein, *Notes on the Theory of Aggression*, 3-4 *THE PSYCHOANALYTIC STUDY OF THE CHILD* 9 (1949).

¹¹ I am grateful to Heinz Lichtenstein for this observation.

¹² For a thorough analysis of these questions see Lichtenstein, *Identity and Sexuality*, 9 *J. AM. PSY. ASS'N* 179 (1961).

further consequence of the Cartesian bias: Professor Ehrenzweig's lack of sympathy with what he calls the search for absolute justice.

According to Professor Ehrenzweig, since people don't know (rationally) what justice is and because people have different (emotional) senses of justness the wish for absolute justice is absurd. I have less trouble with this conclusion—which is hardly fresh and certainly does not require a psychoanalytic jurisprudence for its articulation—than with how Professor Ehrenzweig reached it. If absolute justice means justice for all times, places and peoples then a denial of its existence receives much support as an empirical statement. But I would suggest that this conception of the meaning of absolute justice is the product of a Cartesian bias. If all people at a given point in time felt that genocide was wrong but had difficulty rationalizing this feeling with sufficient rigor to make it compelling in other times, only a Cartesian bias prevents an assertion that for *this* time genocide is wrong as a matter of universal principle.¹³ The processes of Identification and Introjection, which make possible the formation of an Ego Ideal in the individual, may produce this concurrence through socialization. But to accept this requires, in part, 'recognizing the connection between Piaget's structural theory of cognitive development¹⁴ and psychoanalytic theory. Bienenfeld recognized this connection when he took the position that as of 1940 genocide was wrong as a matter of natural law.¹⁵ Professor Ehrenzweig duly acknowledges his debt to Bienenfeld, somewhat less so to Piaget, but does not seem to have adequately recognized the implication of assimilating theories of cognitive development and psychoanalytic theory: absolute justice *is* relative precisely because cognitive and affective capacities are time-specific in human development.

C. *The Superego and Justice*

I would make one further comment on the section dealing with justice. Professor Ehrenzweig apparently regards the superego as the source of the human sense of justice. "That facet of the Superego which is referred to in this analysis, we have identified with that innate or inbred sense of justice which is common to all mankind."¹⁶ I must confess that I have read and reread the sections dealing with this thesis and I am unable to determine what Professor Ehrenzweig's point really is. Early in the discussion Professor Ehrenzweig states: "Our study on the origin and functioning of the sense of justice presupposes only those

¹³ On the other hand, Professor Ehrenzweig may have fallen into the trap of assuming that a "scientific" generalization must be *unconditional*. See M. SHERWOOD, *THE LOGIC OF EXPLANATION IN PSYCHOANALYSIS* 59-60 (1969).

¹⁴ See J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* chs. 3, 4 (1960).

¹⁵ See Bienenfeld, *Prolegomena to a Psychoanalysis of Law and Justice*, 53 CALIF. L. REV. (pts. 1-2) 957, 995-98, 1254 (1965).

¹⁶ A. EHRENZWEIG, *supra* note 2, § 166.

conceptions of Ego and Superego which, with minor variations, are virtually beyond dispute."¹⁷ On the next page Professor Ehrenzweig warns us that "[w]e shall similarly refrain from trying to decide whether the sense of justice (or injustice) is related to an inherited product of the pleasure principle or is the result of each individual's experience."¹⁸ After reading the previous passage I had assumed Professor Ehrenzweig was referring to the structural role of the superego as connected with the sense of justice. Were my assumption correct there could be no question whether the sense of justice is learned or inherited. One does not learn to have a superego. Its function in mental processes is, in Freudian theory, phylogenetic. Since I cannot imagine that Professor Ehrenzweig is mistaken about a concept as central to Freudian theory as the superego, I then assume that he was using the term superego to mean something different. However, on the following page he again refers to the superego, "the leading actor in our drama,"¹⁹ as engaging "the Ego in that vital and lasting struggle which we must probably [*sic*] see as the vital factor in the growth of that sense of justice"²⁰ This is a fairly conventional picture of the structural relationship between superego and ego, however, and it has nothing to do with learned behavior.

In the following paragraph we are introduced to the "[t]hree elements [which] are commonly said to constitute the Superego" These are concern for others, introjection of external norms, and aggression "aroused by frustrating objects in the outer world."²¹ I found the articulation of two of these "constituent elements" something of a surprise, having not come across them previously. For the first and last elements Professor Ehrenzweig cites Franz Rudolph Bienenfeld,²² who may have been a pioneer in the application of psychoanalysis to law but is virtually unknown in psychoanalytic theory. For the first constituent element Professor Ehrenzweig also cites D. W. Winnicott by cross reference to another footnote which makes no reference to Winnicott's work. Professor Ehrenzweig's bibliography contains only one early essay by Winnicott on the subject of guilt.²³ Winnicott has written a great deal on boundary maintenance and early human development, much of it potentially germane to law.²⁴ But he cannot be used to establish a constituent element of the superego as "commonly recognized." I take it as significant that in this passage Professor Ehrenzweig

¹⁷ *Id.* § 156.

¹⁸ *Id.* § 157.

¹⁹ *Id.* § 158.

²⁰ *Id.*

²¹ *Id.* § 159.

²² Bienenfeld, *supra* note 15, at 1261.

²³ Winnicott, *Psycho-Analysis and the Sense of Guilt*, in *PSYCHO-ANALYSIS AND CONTEMPORARY THOUGHT* 15 (J. Sutherland ed. 1959).

²⁴ See, e.g., Winnicott, *Transitional Objects and Transitional Phenomena* (1953); *The Location of Cultural Experiences* (1967), both in *PLAYING AND REALITY* (1971).

makes no reference to Freud. I take it as also significant that two paragraphs later Professor Ehrenzweig refers to the ego ideal as a "meta-Freudian speculation," despite the fact that it played a central role in Bienenfeld's analysis of the paternal superego.²⁵

In any event, having set forth the constituent elements of the superego, Professor Ehrenzweig says nothing more about them other than to assert that cavil by experimentalists and Jungians cannot "affect the sole thesis of our analysis, the great triad's [id, ego, superego?] crucial role in our sense of justice." I assume by the insertion that Professor Ehrenzweig is not referring to the previously discussed three constituent elements of the superego as the "great triad." Such an assertion could not be maintained. If he is referring to the triad I inserted in the quotation, Professor Ehrenzweig has here introduced the concept of id as relevant to the justice issue and reduced the superego to a role less than that of principal actor. However, on the next page the great triad is transmogrified into the "Oedipus complex." Surely Professor Ehrenzweig does not think they are the same. In any event, I am not sure it was wise for Professor Ehrenzweig, who was certainly attempting to demonstrate the utility of psychoanalytic theory as applied to law, to have concluded this brief exploration with the following sentence: "Though concededly a mere symbolic structure of necessarily overlapping and indistinct stages in infantile development, Id, Ego and Superego, Pleasure and Reality, have sufficed to substitute a vital language for [the] empty verbiage [of jurisprudence/philosophy]."²⁶ I do not understand how *symbolic structures*, particularly *mere* symbolic structures, of indistinct *stages* can provide a vital *language*.

II. RELEVANCE OF THE PSYCHOANALYTIC STUDY OF AESTHETICS

For his psychoanalytic theory of the sense of justice, Professor Ehrenzweig draws heavily on the writings of his late brother Anton in the psychoanalysis of aesthetics. In the process I think Professor Ehrenzweig does not do justice to the psychoanalytic study of art in general, and transposes Anton's concepts and language without a fairly convincing justification for the applicability of either to the new context.

Professor Ehrenzweig's aesthetics is the aesthetics of perceptual art. Yet the oldest and most mature work in the psychoanalysis of art forms has been done with literature. Individual interactions with literary works defy explanation purely in terms of perception (conscious or unconscious). The same observation holds, perhaps in a somewhat different sense, for the process of literary creation. But there is a more important point to be made in this regard. Most of the good psycho-

²⁵ See Bienenfeld, *supra* note 15, at 1264.

²⁶ A. EHRENZWEIG, *supra* note 2, § 161.

analytic study of literature regards the mechanisms of defense as crucial to such study.²⁷ With one exception²⁸ Professor Ehrenzweig's discussion of aesthetics and justice does not take account of the mechanisms of defense. It may be that they are indeed irrelevant to the sense of justice or senses of justness, but the case needs to be made affirmatively, not by ignoring the available research information and theory.

It is difficult to explain Anton Ehrenzweig's theory²⁹ in a few words, but I think it is essentially a theory of perception that attempts to bring together cognitive and affective determinants. Anton argues that artistic perception involves being in touch with an unconscious perceptual level that is gestalt-free. Because it is gestalt-free and because it is unconscious and influenced directly by drives, gestalt-free perception allows one to see things in ways only minimally influenced by conventional perceptual organizations. Anton's theory, then, involves articulating the drives which influence this perceptual level and the barriers interfering with conscious communication with this unconscious level.

There are difficulties with Anton's theory which are relevant to an effort to transpose it to law and justice. Central among these is the question of order. According to Anton, the gestalt perception of the "surface" mind is an ordering of stimuli/experience. This gestalt perception is constantly being threatened by the gestalt-free perception of the "depth" mind. But the gestalt-free perception of the depth mind contains its own "hidden order"; it is the level of mind where all things

²⁷ See, e.g., F. CREWS, *SINS OF THE FATHERS: HAWTHORNE'S PSYCHOLOGICAL THEMES* (1966); N. HOLLAND, *THE DYNAMICS OF LITERARY RESPONSE* (1968); S. LESSER, *FICTION AND THE UNCONSCIOUS* (1957).

²⁸ The exception is a curious one. Professor Ehrenzweig, taking his cue from Freud and Anton Ehrenzweig (see ANTON EHRENZWEIG, *supra* note 1, at 64-65) seems to suggest that sense of beauty is basically pure defense. See A. EHRENZWEIG, *supra* note 2, § 148. The theory seems to be that when human beings evolved into bipeds they were subjected to an overload of sexual stimuli produced by the diffusion of genital excitement to other parts of the female body. The sense of beauty then evolved to "neutralize" the excess of stimulation. This is truly a bizarre hypothesis. Of course, Freudian theory and considerable clinical evidence indicate that sexuality is implicated in all aspects of human behavior. From this it certainly follows that sexuality should have something to do with the sense of beauty too. But this is a far cry from saying that the sense of beauty is a distancing mechanism made necessary by an overload of sexual stimulation produced by the evolution of erect gait. In the first place, the theory is sexist: it is males who are subjected to the overload by looking at females. Second, it assumes that visual stimuli are primary in an (assumed) hierarchy of sensory perceptions. One could readily reach a contrary conclusion by arguing that erect gait reduced olfactory perception and thereby reduced sexual stimulation. The sense of beauty may have evolved to fill the resulting gap in sexual stimulation rather than to neutralize an overload. This possibility, contrary to Professor Ehrenzweig's suggestion, is supported by Lawrence Kubie's finding that "hormones exercise a decreasing influence as one ascends the evolutionary scale . . ." Kubie, *Instincts and Homeostasis*, 10 *PSYCHOSOM. MED.* 15 (1948). I will concede that it is possible, though implausible, that the evolution of erect gait produced so much sexual stimulation that human beings needed both a biological and a psychological corrective to restore the balance and that the sense of beauty served the latter function. But a theory so formulated requires substantially more argument and evidence than Professor Ehrenzweig is prepared to offer.

²⁹ See ANTON EHRENZWEIG, *THE HIDDEN ORDER OF ART* (1968); ANTON EHRENZWEIG, *supra* note 1.

are one, undifferentiated and unitary. Pressures from this depth mind threaten to disintegrate the gestalt perceptions of the "surface" mind.³⁰ Within the matrix of gestalt-free perception Anton identifies a "hidden order" of art.³¹ One consequence of this psychic "conflict" is a distinction between the sense of beauty which is phylogenetic, and judgments of beauty which are individual. However, what I find to be missing in this scheme is a full articulation of the impact of the social context of human beings. That the ordering and reordering of perceptual fields is significantly social has been recognized by several writers with quite different major concerns.³² For the immediate purposes of this Review, the issue seems to be whether art is a social process in the same sense that law is a social process.

It is to his credit that Professor Ehrenzweig recognizes this issue when he repeats Anton's characterization of modern art as an assertion of the void, without a tradition or a communicative capacity, and adds: "in contrast to art, law cannot accept this posture [of modern art] in relation to a society which needs a concrete, conscious and coherent order for its survival."³³ I think this is clearly true, but it involves an assertion that law has an implicit (functional) morality, an assertion which Professor Ehrenzweig would otherwise consider to be purely emotional. Consequently, unless his assertion can be connected to the (universal)³⁴ sense of justice rather than to (individual) judgments of justness there is no reason, in his terms, why one should accept it.

III. THE EXAMINATION OF CRIMINAL LAW FROM A PSYCHOANALYTIC PERSPECTIVE

In the final chapter of his book Professor Ehrenzweig deals with serious current issues in substantive criminal law, tort law and civil procedure from a psychoanalytic point of view. I will discuss only briefly his treatment of criminal law issues.

Professor Ehrenzweig describes the "principal thesis" of his discussion as "the need of criminal law for a fundamental distinction between types of crimes."³⁵

³⁰ Cf. Schachtel, *On Memory and Childhood Amnesia*, 10 *PSYCHIATRY* 1, 17-18 (1947).

³¹ Professor Ehrenzweig suggests that this be regarded as a "hidden source of order rather than as the source of a hidden order," A. EHRENZWEIG, *supra* note 2, § 148, much in the way that he suggested Kelson's Pure Theory of Law should be called a theory of pure law.

³² See, e.g., M. KADISH, *REASON AND CONTROVERSY IN THE ARTS* (1968); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); M. PECKHAM, *MAN'S RAGE FOR CHAOS* (1965).

³³ A. EHRENZWEIG, *supra* note 2, § 138.

³⁴ See *id.* § 125.

³⁵ *Id.* § 179. Professor Ehrenzweig says: "All leading texts deal with crime as if it were a homogeneous concept." *Id.* § 177. He cites by example Jerome Hall, Johannes Andenaes and Gerhard Mueller. What Professor Ehrenzweig means by homogeneous is

We have assumed that the superego's "punitive," moralized counter-aggression acts to reinforce the potential offender's repression of criminal urges. But the degree of such repression which the offender must overcome when yielding to a criminal impulse, and thus the degree of the superego's need for reinforcement of this repression vary greatly with the type of the offense.³⁶

Professor Ehrenzweig holds that the criminal law can reinforce superego control of impulses as to some types of offenses, but that it is powerless as to others. The typology is simple:

These two types of crime, according to the genesis of their underlying urges, can very roughly be distinguished as oedipal and post-oedipal, according to whether their commission presupposes repression of an urge which dates back to our oedipal period of parricidal wishes.³⁷

I have a number of difficulties with this formulation.

1. That the superego is formed during the oedipal (genital) period is generally accepted. It is formed, however, to deal specifically with the incestuous wishes that arise during this period. Professor Ehrenzweig seems to assume that because the superego is formed during the oedipal period neither anti-social drives nor moral repression can predate the genital stage. This is contrary to an enormous body of literature on the subject. Ferenczi referred to earlier repressive devices as sphincter morality. Indeed, Erik Erikson identified the second stage of human development, corresponding roughly to the anal period, as the time during which the individual develops a sense of "law and order" in both the positive and negative sense of the phrase.³⁸

Professor Ehrenzweig himself concedes that human aggression in general may well be pre-oedipal, but he seems to limit the manifestations of such aggression to collective forms of revenge by retaliation. There is indeed psychoanalytic evidence for the proposition that the desire for revenge has its genesis during the oral period³⁹ and is therefore quite strong, in accordance with the general psychoanalytic view that the more primitive drives have greatest influence on subsequent behavior. But Professor Ehrenzweig offers no reason for limiting oral

not clear to me. His examples do not clarify his use of the term, nor do they reflect the textual assertion as to "all leading texts." Perhaps Professor Ehrenzweig means that no text reflects the typology he proposes, which is certainly true.

³⁶ *Id.* § 179.

³⁷ *Id.* § 180.

³⁸ See E. ERIKSON, *CHILDHOOD AND SOCIETY* ch. 7, § 2 (1963).

³⁹ See K. ABRAHAM, *The First Pre-Genital Stage of the Libido* (1916), in 1 *SELECTED PAPERS* 248 (1957); M. KLEIN, *ENVY AND GRATITUDE* (1957); Socarides, *On Vengeance: The Desire to "Get Even,"* 14 *J. AM. PSY. ASS'N* 371 (1966). See also Wilbern, *Titus Andronicus and the Theme of Oral Revenge* (1972) (unpublished paper presented to the Group for Applied Psychoanalysis, Center for the Psychological Study of the Arts, State U. of N.Y. at Buffalo).

revenge to its *collective* manifestations. This observation has serious consequences for his oedipal crime category.

2. My best reading of the text indicates that only "passion murder"⁴⁰ is in the category of oedipal crime. One may wonder at the utility of a typology which has this consequence, but there are more theoretical (and more interesting) difficulties. I assume that Professor Ehrenzweig was not using the notion of parricide *literally*,⁴¹ yet he refuses to include the crime of incest in the category of oedipal crime because of "the many disparate types of incest in daily judicial practice which center around intra-family crimes between nonrelatives such as the step-father and his 'child.'"⁴² Of course this is true, but it is also true that most "passion murders" do not involve fathers and sons. That being the case, what is it that makes events oedipal? The only intelligible answer is that the acts involve oedipal fantasies. This may very well be true, but it is impossible to know from the happening of an event the description of which is in part determined by positive law whether or not such fantasies are present. This points up the central difficulty with the "oedipal crime" notion. Professor Ehrenzweig has overlooked a principle long recognized in criminology: one cannot develop a typology based on positive law definitions—of which "passion murder" surely is one. Is the killing of a wife by a husband an oedipal crime?⁴³ Can it be oedipal in the same sense as the killing of a mother by a son?⁴⁴ Is a real act of incest between father and daughter⁴⁵ oedipal in the objective sense or is it oedipal in the subjective sense that it reflects primitive conflicts between the defendant and his mother? Is it an oedipal crime when several young men snatch a purse from an old lady and one of them gratuitously throws her to the ground? Does the answer depend on whether or not the injury produces immediate death?

3. All of these difficulties are involved in Professor Ehrenzweig's catchall category of post-oedipal crime—theft, "welfare offenses," simple infractions.⁴⁶ As to these, he holds, the severity of the criminal sanction may be rationally varied because a reinforced superego is likely to be effective. Here there are difficulties additional to those previously discussed. Professor Ehrenzweig does not note that it is in this category that one encounters most recidivism—a fact which conflicts with the drive/repression basis of his typology. This conflict may have caused Professor Ehrenzweig to misread the data. He cites the experience in

⁴⁰ See A. EHRENZWEIG, *supra* note 2, § 180 *et passim*.

⁴¹ See *id.* § 203 *et passim*.

⁴² *Id.* § 180 n.25.

⁴³ See, e.g., *Commonwealth v. Carroll*, 412 Pa. 525, 194 A.2d 911 (1963).

⁴⁴ See, e.g., *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

⁴⁵ See, e.g., *United States v. King*, No. 655-5 (D.C. Cir. 1956), discussed in R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 50 (1967).

⁴⁶ A. EHRENZWEIG, *supra* note 2, § 180.

Denmark during World War II when the occupation forces arrested the Danish police. Professor Ehrenzweig says this "resulted in the abandonment of all punitive measures. There was hardly a change in the number of oedipal crimes which, as we shall see, are largely inaccessible to deterrence On the other hand, the number of post-oedipal crimes increased enormously, quite clearly because of the absence of the needed deterrence."⁴⁷ But Professor Andenaes' report of this experience is rather different.⁴⁸ All punitive measures were not abandoned. Indeed, the penalties for those caught were increased. Andenaes ascribes the rise in the crime rate to a lower probability of *detection*, whereas Professor Ehrenzweig is discussing the severity of sanction. Furthermore, Professor Andenaes says: "The general crime rate rose immediately, *but there was a great discrepancy between the various types of crime.*"⁴⁹ Professor Ehrenzweig deals with property crimes as an undifferentiated category,⁵⁰ but in the Danish experience the robbery rate increased while the rate of fraud and embezzlement cases showed no significant increase. Professor Ehrenzweig makes no mention of these contradictions between his theory and the available data.

4. There are a number of additional difficulties with Professor Ehrenzweig's discussion of the criminal law, but I will be content with only one further observation. Professor Ehrenzweig takes the position, as he did earlier in connection with his discussion of justice,⁵¹ that psychological explanations are necessary where reason fails in its effort to clarify, understand or have an effect on the world. Therefore, since punishment does not deter oedipal crime the explanation for the crime and the punishment must be psychological. (Professor Ehrenzweig does not indicate whether he means by non-deterrance a high rate of recidivism or a failure to completely eliminate the incidence of such crimes.)

Professor Ehrenzweig's theory reflects the established Freudian truism that aversions are strong in proportion to the desires which they reject. Hence the "earliest and therefore strongest repression is implanted against the child's Oedipal wish to kill one parent and commit incest with the other."⁵² On this view it is curious that murder ever takes place—given the strength of the repression. When it does occur we know that an extraordinary degree of repression was overcome. "Such an oedipal crime can thus occur only due to an 'abnormal' absence of repression or due to an overpowering urge."⁵³ In the face of

⁴⁷ *Id.* § 181.

⁴⁸ See Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966).

⁴⁹ *Id.* 962 (emphasis added).

⁵⁰ See A. EHRENZWEIG, *supra* note 2, § 182.

⁵¹ See text accompanying notes 14-15 *supra*.

⁵² A. EHRENZWEIG, *supra* note 2, § 203.

⁵³ *Id.* § 180.

this urge the fear of punishment is impotent.⁵⁴ Consequently, social punishment must be irrational since it cannot be effective. The psychological explanation for irrational social punishment is that it expresses a repressed wish which, in turn, generates guilt, which, in turn, demands a scapegoat.⁵⁵ According to Professor Ehrenzweig, guilt is the result of *repressed* aggressions (by society)⁵⁶ as well as *expressed* aggressions (by the individual). Apparently, as the original Oedipus discovered to his chagrin, it is a game you cannot win. Murder and the punishment therefor are irrational but neither can be given up because the other (or the fear of the other) exists.

Professor Ehrenzweig explains the insanity defense as society's effort to forego retribution by saying that anyone who overcomes severe oedipal repressions must be insane.⁵⁷ Yet juries continue to punish because of "the community's reluctance to forgo vengeance for charity."⁵⁸ That juries do act out of a desire for vengeance has been questioned by the results of at least one experiment,⁵⁹ but for Professor Ehrenzweig "the artist's intuition in 'The Twelve Angry Men' has furnished [the proof] more persuasively than the sociologists' staged experiment."⁶⁰ Lest anyone should conclude from this that the jury system should be abandoned in order to eliminate vengeance, Professor Ehrenzweig counsels that "it must be preserved to correct an incorrigibly irrational, retaliatory criminal law . . ."⁶¹

IV. CONCLUSION

There is something to be said for Anton Ehrenzweig's theory which Professor Ehrenzweig did not choose to deal with.⁶² The sense

⁵⁴ *Id.*

⁵⁵ *Id.* § 186.

⁵⁶ *Id.*

⁵⁷ *Id.* § 203.

⁵⁸ *Id.* § 197.

⁵⁹ R. SIMON, *supra* note 45, at 170 (1967).

⁶⁰ A. EHRENZWEIG, *supra* note 2, § 197.

⁶¹ *Id.* § 229.

⁶² According to Anton,

Manic envelopment by 'oneness' and depressive detachment by 'otherness' characterize two different stages in creative work It is in this final depressive stage that the work of art assumes independent existence and 'otherness.' In the preceding manic stage of unconscious integration the artist has not yet detached himself from his work. It is to this aspect of creative work that that the manic feeling of oneness, envelopment and mystic union belongs.

ANTON EHRENZWEIG, *THE HIDDEN ORDER OF ART* 119 (1968).

In modern art the ego rhythm is somewhat onesided. The surface gestalt lies in ruins, splintered and unfocusable, the undifferentiated matrix of all art lies exposed and forces the spectator to remain in the oceanic state when all differentiation is suspended As the ego sinks toward oceanic undifferentiation a new realm of the mind envelops us; we are not engulfed by death, but are released from our separate individual existence.

Id. 121-22 (emphasis added). Anton adds that in the innermost workings of the creative mind "the differentiation of sexes, of death and birth, love and aggression ceases to make sense." *Id.* 131.

of beauty, like sexuality and aggression,⁶³ may operate in favor of difference, distinction and disorder.⁶⁴ It may be one of the ways in which human beings form a sense of individual identity. But individuation also brings separation anxiety and a sense of isolation.⁶⁵ This is a paradox. But there is no self-evident reason to reject the possibility that paradox is the essence of psychological man.⁶⁶ Hence the sense of justice indicates, in the words of *The Last Whole Earth Catalog*, that "It is together," but individuation produces different perceptions of justness. The "hidden order" is the order of paradox. Perhaps poignantly, paradox informs most of Professor Ehrenzweig's most important work. He has spent most of his intellectual life studying conflict to conclude in his work on the conflict of laws,⁶⁷ as well as in this book, that most if not all conflict is false. Yet it would seem that the conflict is as real as his own desire to resolve it. The extent to which his effort in this book was misdirected is best expressed in the epigram to this review.

⁶³ Fighting is a way of saying 'this is me, I am different (in fact opposite) from you.' It is like pinching oneself to be sure one is not dreaming, except that the members pinch one another, saying, as it were, 'I hurt, therefore I am.' We might here recall Lorenz' argument that only species characterized by intra-specific aggression are capable of forming personal bonds.

P. SLATER, *MICROCOSM* 179 (1966).

⁶⁴ Thus arises the paradox of human behavior: the very drive to order which qualifies man to deal successfully with his environment disqualifies him when it is to his interest to correct his orientation. To use an old expression, the drive to order is also a drive to get stuck in the mud. There must, it seems to me, be some human activity which serves to break up orientations, to weaken and frustrate the tyrannous drive to order That activity, I believe, is the activity of artistic perception.

M. PECKHAM, *supra* note 32, at xi.

⁶⁵ Slater hypothesizes that "sexual differentiation is critical in facilitating the ability to discriminate among objects and ultimately to form a separate idea of oneself." P. SLATER, *supra* note 63, at 242. See also Lichtenstein, *The Dilemma of Human Identity*, 11 J. AM. PSY. ASS'N 173 (1963).

⁶⁶ The problem of individual identity and social alienation may be one form of the paradox. That is, lacking an innate identity, people must define themselves in terms of something not themselves. This process may or may not *inevitably* produce alienation as a byproduct. (Walter Kaufmann, in an otherwise silly book, holds "that alienation is the price of self-consciousness, autonomy, and integrity." W. Kaufmann, *With Guilt and Justice* 140 (1973).) In any event this question must be faced and I do not think Mr. Tigar, in his review of this book, has done so. See Tigar, *Book Review*, 86 HARV. L. REV. 785 (1973).

⁶⁷ A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* (1962).

AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE. BY JONATHON D. CASPER. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972. Pp. xiv, 178. \$5.95.

Clarence C. Kegel, Jr.†

Timothy S. Hardy††

The typical criminal defendant is disappointed by the American criminal justice system. He may be aware of procedural safeguards granted by the Warren Court, but he does not perceive the principles underlying them and considers them irrelevant to his plight. He does not even relate the concept labeled "justice" to his experiences in the system. Those are the stark conclusions drawn by Jonathon D. Casper after interviewing seventy-one criminal defendants.¹ Casper's portrait is of a creaking, lawless assembly line onto which the defendant is thrown when arrested, impersonally handled while being processed, and ritualistically tossed off at its end. It is perceived by the typical defendant as a conglomeration of just laws enforced by unprincipled men who do a job but care not about him.

With the exception of some narcotics offenders, all the defendants Casper interviewed agreed the laws for violation of which they had been charged were good laws, which correctly punished antisocial acts. Even before their arrests, the defendants had recognized and understood society's disapproval of their acts, but that disapproval had not been internalized. Conscious recognition was not accompanied by subconscious deterrents to, or guilt about, involvement in criminal activity. The criminal proceedings did little to encourage internalization. Defendants found little to respect in the system; rather, they discovered it was a game that could be mastered by the adroit. The system encouraged defendants to have but one goal, returning as quickly as possible to "the street." Achievement of that goal required defendants to engage in hard bargaining, false remorse, and deceit. Defendants quickly discovered that success in the system, like success on the street, came to those who played the hardest.

The arrest, although disliked, was not unexpected. Most of the defendants admitted regular involvement in crime and expected to

† B.A. 1969, Franklin and Marshall College; J.D. 1972, University of Pennsylvania. Member, Pennsylvania Bar.

†† B.A. 1969, Amherst College; J.D. 1972, Yale University. Member, Ohio Bar.

¹ The interviews lasted an average of 1½ hours. All the defendants had been charged with felonies, primarily breaking and entering or narcotics offenses, in Connecticut. Forty-nine were incarcerated when interviewed; 16 were on probation; and 6 had obtained dismissals or acquittals. J. CASPER, *AMERICAN CRIMINAL JUSTICE* xii (1972) [hereinafter cited as CASPER].

serve time sooner or later.² Some insisted they had not committed the particular offense for which they were convicted, but nevertheless did not find it particularly disturbing to be found guilty. Other undetected crimes justified the conviction.

Contrary to what one might have expected, the defendants expressed little animosity, resentment or even disdain for the police. Instead, the "cop" was the first stop on the assembly line, merely one of the functionaries performing his assigned task. As one man said:

I see them as people following orders, and that's all, you know, like anybody else. They got a job and they do the job, that's all. They don't think about it one way or the other. The majority of them, I think. Some of them are—some of them are oppressive; some of them are fair. But I don't think cops in general, you know, are oppressive.³

The typical defendant viewed his criminal activity, too, as a job. Those who are good at the job elude the police; those not as good get caught but learn a lesson useful in future criminal enterprise.⁴ Policemen are the natural opponents of the criminal in the game he plays, no more nor less corrupt, just different men playing different roles.

Well-recognized by the defendants was the overwhelming presence of the plea-bargaining institution. Before arrest, the trick was to remain unapprehended; after arrest, thoughts turned to making the best possible bargain and arranging a quick release. Rarely did the defendant contemplate demanding a trial, because, to a great extent, he recognized his guilty past. This was especially true if he was not free on bail. While in pretrial incarceration, a defendant is separated from the familiar elements of his environment and suffers great anxiety over his future. Perceiving little chance of acquittal, he is concerned only with avoiding long incarceration. The key man who can help the defendant achieve that goal is the prosecutor. The defendant knows the prosecutor's job is to get convictions; if the prosecutor is willing to help the defendant achieve his goal, he is willing to save the prosecutor time, effort and possible failure by pleading guilty.

Defense counsel is supposedly the criminal's ally, but rarely was he

² Casper's technique of presenting lengthy quotes from the defendants is very effective. For example, one man explained his apprehension this way: "I was walking down the street. I knew they were looking for me. I knew it was just a matter of time, really. When I saw them, I saw the cruiser across the street and I was sure that they had me, and you know, that was it." *Id.* 4.

³ *Id.* 38.

⁴ The following dialogue is illustrative:

Do you think a guy can get away with crimes indefinitely? If he's bright enough?

Yup.

What do you think about that? Is it a good thing or a bad thing?

It's good.

It's good?

I think it's quite an achievement, really.

Id. 41.

perceived as such. The defendants viewed their attorneys, usually public defenders, as employees of the state, naturally aligned with it, and therefore not deserving of trust. Defendants believed that to have an attorney on their side and to have any control over him, financial leverage was necessary. They knew the public defender receives the same fee from the state whether he wins or loses. They were confirmed in their distrust of the public defender when he did not visit them in jail, never sought from them details of their background or of the alleged crime, and acted only as a conduit to the prosecutor. Defendants with privately retained counsel were more likely to feel they had an ally. They felt secure in the role of paymaster and were reassured by the greater amount of attention they received. Even if the bargain made was not better than that which the public defender could have obtained, the defendant was likely to be more pleased with it.

Once a bargain is made, the defendant is paraded before a judge to plead and ultimately to be sentenced. He knows the "cop-out ceremony" is a ritual charade, and he knows the standard responses expected of him: yes, the plea is voluntary; no, he has been offered no deals; yes, he committed the offense charged. The truth of any of the answers is irrelevant. The assembly line would be jolted to a halt, however, the defendant knows, if he gave the wrong answers. Although the judge usually asks the questions, his role is peripheral; he merely formalizes what has already been decided. When he pronounces sentence, he is merely doing what the prosecutor determined should be done. In interview after interview, Casper was told the defendants' responses to the judges' questions were lies, known to be such by everyone involved.⁵ The lies were perpetrated because they were required by the rules of the game.

Once sentenced, the defendant feels either that he has played the game well and gotten off lightly, or played it poorly and received a stiff sentence. He is unlikely to use words such as "fair" or "unfair," "just" or "unjust." Although his awareness of procedural safeguards might have been sharpened slightly, his understanding of them would have related only to their utility in the strategy of the game. He remains unaware that principles such as presumption of innocence, fair warning, due process or effective assistance of counsel are fundamental tenets in a carefully conceived framework designed to ensure "justice." He does not find in the system the concern for the individual that those concepts purport to provide. That concern is thwarted by players on a stage, with predefined roles, insensitive to the purposes of those fundamental tenets—the prosecutor's purpose is just to get convictions, and the judge is there to enjoy the grandeur of his position and sanction the prosecutor's work. Moreover, the perceived effect of these rights—even as they pertain to the "game"—is likely to be minimal. The defendant

⁵ *Id.* 83.

does know that personal attention, encouragement of self-reform, and guidelines for future conduct were not extended. He is thrown off the assembly line with great probability that he will be dragged on again at some future date.

Casper's findings are not surprising. Well-publicized facts about the large number of unsolved crimes, high percentages of defendants who plead guilty, overworked courts, prosecutors and public defenders, and high recidivism rates, have prepared us to believe the defendant's perspective is as Casper found it. The book nonetheless provides a dramatic summary of the failings of the criminal courts. Inevitably, one finishes the book wondering what can be done.

Although Casper's description is well executed, his suggestions for reform are few and not carefully developed. The orientation he would assume in suggesting reforms, however, is clear:

[The criminal justice system] ought to teach the defendant not only that what he has done is wrong, but also that there are alternative ways in which he might live his life. It ought not be a lesson that he is an irremediably "bad" man, nor that no one in the society really knows or cares what happens to him as long as he can be gotten rid of for the moment.⁶

Casper believes the system should demonstrate concern for the accused as an individual. Rather than being a gamelike jungle, reminiscent of the environment the criminal comes from, it should be structured like a family in which an offender is treated as "a kind of wayward son, whose misconduct produces punishment but not rejection."⁷

Some commentators have argued that the current system does teach the proper lessons. Since the real world will confront the defendant with exploitation and individuals carefully calculating what will best serve their selfish interests, the criminal justice system should reflect that world and teach the defendant to cope with it. Otherwise, the system will breed false expectations and will leave the defendant as helpless as ever to survive under the pressures of everyday life. Casper rejects this argument. He reasons that, although there is a danger of raising false expectations, the system must "reflect [defendants'] aspirations of how they would like to live."⁸ If it does not, he sees little hope of their ever achieving these aspirations. Casper's *parens patriae* model of the criminal system, however, is seriously flawed.

The *parens patriae* model has had a long, unsuccessful trial in the juvenile court system. That system was designed, as the Supreme Court phrased it in *In re Gault*,⁹ to make the child "feel that he is the object of

⁶ *Id.* 171.

⁷ *Id.* 172. Casper attributes his ideas in part to Griffiths, *Ideology in Criminal Procedure*, 79 *YALE L.J.* 389-90 (1970).

⁸ CASPER 173.

⁹ 387 U.S. 1, 15 (1967).

[the State's] care and solicitude." The Court found that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."¹⁰ In challenging the effectiveness of the *parens patriae* model, the Court relied on studies showing high recidivism rates among juveniles and concluded the system had not proven effective "to reduce crime or rehabilitate offenders."¹¹ The Court emphasized recent studies suggesting "that the appearance as well as the actuality of fairness, impartiality and orderliness . . . may be a more impressive and therapeutic attitude so far as the juvenile is concerned."¹² Giving deference to the Supreme Court, there must be at least serious doubt that the *parens patriae* model Casper proposes would be effective, or even useful, in the criminal justice system. It would subordinate stern discipline and evenhanded application of principle to the cry for solicitude. We think this would repeat the mistake of the juvenile courts. By making the defendant "comfortable" in his confrontation with the system, Casper's proposals would undermine the deterrence of the penalties meted out and the potential educative effect of the defendant's experience. The system should make the defendant uncomfortable with his experience but, in doing so, should impress upon him the principles underlying the law. It should avoid patronizing him and give him the dignity of a full-fledged adult, while at the same time endeavoring to achieve the internalization of legal and social mores that either never occurred or foundered along the way. The condescending guardianship of a family model system runs the risk of implicitly approving criminal conduct and at the same time leaving the defendant with the feeling that the system's operatives do not and never will understand him.

The lessons to be learned from the juvenile justice experience are helpful in getting at the real problem that Casper touches upon. The deficiency in the present system suggested by Casper's findings is not that it fails to take the defendant under arm, pat him on the back, and send him on his way after long, sympathetic discussions, but that the system produces and sanctions lying and deception. A deleterious effect is inevitable: the defendant is taught that the very way of life that brings him before the court is justified by the appropriate rewards that lie at its end; he sees the law as lawless. Perhaps change is needed to reestablish law and justice in the criminal processing system and to give it a socially useful, educative function.

Casper's findings demonstrate that it is the plea bargain that is central to the lying and deceit in the system. All of the defendant's perceptions are inextricably tied to the reality of the bargain. Because guilt is never adjudicated, commission of the alleged offense seems un-

¹⁰ *Id.* at 18.

¹¹ *Id.* at 22.

¹² *Id.* at 26.

important; the defendant's recognition that he has at some time done wrong suffices. Objections to police practices are never voiced, except perhaps as a bargaining weapon. Pretrial incarceration is the prosecutor's weapon in the bargaining process. The roles of the judge and of defense counsel are minimal, that of the prosecutor central. The bargain makes in-court proceedings a charade. Sentencing depends not on deterrence, or rehabilitation opportunities, but on the way the bargaining game is played.

If the plea bargain is at the core of the failure of the modern criminal justice system, as Casper believes—and we suspect—efforts for reform must be focused at that front, and the primary educative element must be imparted there. Plea bargaining has been defended in the past on a number of grounds. Casper's findings would seem to rebut all but the most fundamental rationale supporting the practice. It has been suggested that plea bargaining gives the defendant a feeling of participation in his disposition and that his acknowledgment of guilt is a step toward rehabilitation.¹³ Casper's findings demonstrate that participation in bargaining only confirms the defendant's belief that the system is unprincipled, and that there is no true acknowledgment of guilt in a plea proceeding the defendant knows is a charade. Plea bargaining does, however, serve what is usually deemed its primary purpose: preventing what might well in many jurisdictions be an overwhelming crush of trials from which the courts would never recover. Since as many as ninety percent of all indicted felons now plead guilty, the increase in courtroom time that would be necessitated if they were all given trials is too much to ask of the judicial system. It is the bargain that encourages guilty pleas; few defendants could be expected to so plead out of altruistic concern for overworked courts. Indeed, without the assurance that a guilty plea will reduce the possible sentence, what reason is there for any defendant not to demand a full-dress jury trial?

Recognizing the indisputable necessity of maintaining some inducement to plead guilty, however, does not eliminate concrete possibilities for reform that would purge many of the hypocrisies from the current system and give it the educative function that Casper seeks. The remainder of this Review will offer several possible improvements. First, the most obvious manifestation of deceit, the concealment of the bargain at the time the plea is presented to the judge, should be eliminated. Second, convictions should not be reversed on the basis of essentially nonfunctional, technical requirements imposed on the guilty plea proceeding. Third, if the court refuses to accept a sentence agreed to through plea bargaining, the defendant should be entitled to plead anew. Each of these changes would in some small measure purify the current system and enhance the educative value of its operation. They should

¹³ Both possible virtues of plea bargaining were suggested by Enker, *Perspectives on Plea Bargaining*, in TASK FORCE ON THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108 (1967).

be viewed, however, only as interim reforms pending a drastic revision of the system to eliminate bargaining altogether while retaining a plea inducement. We will conclude by offering such a proposal.

Should plea bargaining be exposed? Typically, federal and state judges, before accepting a guilty plea, inquire into the voluntariness of the plea.¹⁴ The judge asks whether any promises were made to induce the plea. Despite knowledge by all that a bargain exists, the accused replies, as expected, in the negative. The goal of the questioning is desirable—to ensure that no promises or coercion, other than the plea bargain, have been effected. But, if this is the object, it could be accomplished with integrity by exposing on the record the substance of the bargain. After the court was made aware of the bargain, it could further probe the possibility of other impermissible pressures that would render the plea involuntary.

In addition to providing an opportunity for a defendant to complain of coercion, the judicial inquiries have been justified as a means of placing voluntariness on the record in order to preclude collateral attack on the voluntariness of the plea or, at least, to expedite disposition of such attacks.¹⁵ Although this function is legitimate, fulfilling it need not require that the record negate existence of the plea bargain. The Supreme Court has now made it clear that the record is not conclusive on the question whether a bargain was made.¹⁶ A serious miscarriage of justice would occur if a court endeavored to preclude proof of coercion merely because the record negated such a claim. The legitimate function of the record in discouraging collateral attack, therefore, should be in discouraging prisoners from making false allegations explicitly contradicted on the record, not in encouraging defendants to lie. If anything, putting the bargain into the record should increase the usefulness of the record in expediting disposition of collateral claims of involuntariness, since the bargain as a primary motivating factor would be visible, and difficult for the defendant to explain away. Moreover, eliminating the obvious falsehoods from the record would at once give its entirety a more truthful ring.

Requiring that the terms of the plea agreement be stated on the record would serve another important function. In *Santobello v. New York*,¹⁷ the Supreme Court held that a defendant is entitled to withdraw his plea if the prosecutor fails to keep his side of the bargain. Review of this question in future cases would be greatly facilitated by including the bargain in the original record. In addition, having the defendant tell

¹⁴ This procedure is presently required by the federal rules and the Constitution. *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969); *FED. R. CRIM. P.* 11.

¹⁵ See *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

¹⁶ *Santobello v. New York*, 404 U.S. 257 (1971); *United States ex rel. Culbreath v. Rundle*, 466 F.2d 730 (3d Cir. 1972). 28 U.S.C. § 2255 (1970) is to the same effect. See *Jones v. United States*, 423 F.2d 252, 257 (9th Cir. 1970).

¹⁷ 404 U.S. 257 (1971).

truthfully whether he believes there is an understanding of any sort would prevent the now frequent occurrence of misunderstanding by the defendant as to whether there was a plea agreement at all.

Thus, one change that cannot wait is the presentation of the bargain on the record. Requiring this exposure could be accomplished most effectively by the adoption of a new rule of criminal procedure.¹⁸ However, pending such action, it would seem advisable that the judiciary impose this requirement, in the exercise of its supervisory power. Such action would be justified in order to protect the integrity of the criminal justice system, as well as the judicial process, and to contribute to the system's educative purpose.¹⁹

Beyond suggesting elimination of the obvious hypocrisies of the guilty plea process, Casper's finding that defendants perceive the proceedings as a "circus" also undermines the overly-technical reading given Federal Rule of Criminal Procedure 11 by the Supreme Court and many lower federal courts. Rule 11 sets out requirements for accepting guilty pleas. In *McCarthy v. United States*,²⁰ the Supreme Court interpreted rule 11 to require a district court judge to inquire *personally* of the defendant whether he understands the nature of the charged offense.²¹ The Second, Third, and Fifth Circuits have parroted this language and perhaps parlayed it into a holding.²² This seems imprudent on a policy level and unjustified by the intentions of the rule's drafters.²³

¹⁸ In the federal system it could be annexed to the existing rule 11.

¹⁹ Two circuits have told their districts courts to ask the defendant to put the plea bargain on the record. *Paradiso v. United States*, No. 72-1705 (3d Cir., July 19, 1973); *Walters v. Harris*, 460 F.2d 988, 993 (4th Cir. 1972).

The Supreme Court of Pennsylvania has adopted a very progressive rule along the lines we have suggested. PA. R. CRIM. P. 319(b) provides in part:

(1) The trial judge shall not participate in the plea negotiations preceding an agreement.

(2) When counsel for both sides have arrived at a plea agreement they shall state on the record in open court, in the presence of the defendant, the terms of the agreement. Thereupon the judge shall conduct an inquiry of the defendant on the record to determine whether he understands and concurs in the agreement.

The only apparent shortcoming of this rule is that it does not place an affirmative obligation on the judge to inquire of the defendant whether he believes there is an agreement of any sort. This additional step is necessary to prevent misunderstandings by defendants as to the existence of a deal. The judge should also emphasize that an agreement will not necessarily jeopardize the plea, and that he recognizes agreements to be integral parts of the criminal justice system and desires to have any bargain exposed to protect the defendant.

²⁰ 394 U.S. 459 (1969).

²¹ *Id.* at 467.

²² See *Manley v. United States*, 432 F.2d 1241, 1244 (2d Cir. 1970); *Hopkins v. United States*, 431 F.2d 429 (5th Cir. 1970); *Woodward v. United States*, 426 F.2d 959, 963 (3d Cir. 1970).

²³ Rule 11 currently provides:

The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Rule 11 was amended in 1966. Prior to that time, it read, in relevant part: "The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge."

Establishing such rigid rules of procedure is without purpose and, by exalting form over substance, reinforces the defendant's view that the system is a game to be won by cunning. It is unlikely that a defendant would fathom any meaningful principle in the invalidation of a guilty

As pointed out in *Davis v. United States*, 470 F.2d 1128 (3d Cir. 1972), 3 important changes were made in the rule in 1966, but 2 of them, the requirements that the court determine that the defendant understands the consequences of the plea and that the court satisfy itself that there is a factual basis for the plea, are not important in determining whether the court must undertake the interrogation itself. The difficulty has arisen in interpreting the new requirement that the court not accept the plea "without first addressing the defendant personally."

As also noted in *Davis*, the purpose of this change was to ensure that the defendant personally answered the questions in open court. Although the advisory committee's explanation is less than clear, this is the import of the note accompanying the amendment. There is no indication in the note that permitting the prosecuting attorney to address the appropriate questions to the defendant personally was an evil at which the amendment was aimed.

The advisory committee note to rule 11 cites 3 cases as representative of the precedents that the requirement of "personal" interrogation was intended to change. In 2 of those cases, *Nunley v. United States*, 294 F.2d 579 (10th Cir. 1961), and *United States v. Von Der Heide*, 169 F. Supp. 560 (D.D.C. 1959), the inquiries were answered by the defense attorney rather than the defendant. (In both cases, the inquiries were also rather general and did not ask specifically whether the plea was voluntary and with an understanding of the nature of the charges; but these possible deficiencies would have been irrelevant to the advisory committee's addition of the specific requirement of "personal" interrogation.) In *Nunley*, it is clear that the questions were asked by the court; in *Von Der Heide*, it is unclear who asked the questions. In *Meeks v. United States*, 298 F.2d 204 (5th Cir. 1962), also cited by the committee, the defendant was asked the questions by the United States Attorney. Although it is unclear why the committee cited *Meeks*, it might have been because the district court, in denying the habeas petition, made findings of fact unsupported by the guilty plea record. This interpretation of the citation to *Meeks* permits the conclusion that the court need not personally ask the defendant the required questions: the amended rule would remedy the fault in *Meeks*, as we have defined it, by requiring the decision whether rule 11 has been complied with to be based on the defendant's own responses.

The cases cited by the committee in support of the proposition that it is better to have personal interrogation of the defendant also support the reading that we give to rule 11. Each court was reacting to the absence of responses on the part of the defendant, not to the posing of the questions by someone other than the court. See *United States v. Diggs*, 304 F.2d 929 (6th Cir. 1962); *Domenica v. United States*, 292 F.2d 483 (1st Cir. 1961); *Gundlach v. United States*, 262 F.2d 72 (4th Cir. 1958), cert. denied, 360 U.S. 904 (1959); *Julian v. United States*, 236 F.2d 155 (6th Cir. 1956).

That the new requirement of rule 11 is that the defendant's responses appear on the record is made clear by *McCarthy v. United States*, 394 U.S. 459, 465 (1969) (footnotes omitted):

[T]he procedure embodied in Rule 11 . . . is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to the voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Requiring that the court rather than the prosecutor ask the questions would not in any manner further these purposes.

The fatal error in *McCarthy* was not that the trial judge had not posed the relevant questions, but that the record lacked any indication that they had been asked at all. To find compliance with rule 11 would have required the Court to assume from certain other statements that the defendant understood the nature of the charges.

At least one circuit has held since *McCarthy* that rule 11 is satisfied if inquiries are made in open court by the prosecutor. *Kress v. United States*, 411 F.2d 16 (8th Cir. 1969). Although the literal language of the rule indicates that the "court" shall address the defendant, we do not believe the advisory committee intended that a plea be invalid if instead the prosecutor asks the questions. It would appear that the Supreme Court in *McCarthy*, 394 U.S. at 465-66, misread the advisory committee's intentions.

plea merely because the prosecutor had asked the questions. This would seem to follow *a fortiori* from the defendant's apparent failure to appreciate the significance of basic constitutional rights. It is predictable, however, that he would be proud of his mastery of the game of criminal justice. Is it at all logical to allow a plea to be vacated because of a technical error during a proceeding the defendant considered a charade? Does it not add to the denigration of principle and exaltation of strategy and gamesmanship?

No justification for requiring the judge rather than the prosecutor to inquire into voluntariness would exist even if the proceeding were taken more seriously. It would be entirely speculative to assume that the prosecutor is less likely than a judge to induce a truthful response in open court. True, increased judicial participation in the proceeding would be laudable, and should be required, in an endeavor to increase the "sobriety" at the hearing. But this should be accomplished by a rule of court breach of which would not constitute reversible error. Voluntary compliance by trial courts should be the goal. The system should presume integrity on the part of its judiciary, and shun rules predicated on inherent recalcitrance.

Casper's findings also highlight the question whether courts should allow withdrawal of guilty pleas if a judge fails to accept the prosecutor's bargained-for sentence recommendation. The Third Circuit has said yes;²⁴ but other courts have disagreed,²⁵ and even the Third Circuit may be retreating from its previous holding.²⁶

²⁴ United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972). The Fourth and Ninth Circuits seem to have agreed, in 3 cases in which the judge's sentence differed from what the prosecutor promised; in each case, however, it is unclear whether the prosecutor's recommendation was rejected, or the promised recommendation was not made at all. See Villareal v. United States, 461 F.2d 765 (9th Cir. 1972); Walters v. Harris, 460 F.2d 988, 991-93 (4th Cir. 1972); Macon v. Craven, 457 F.2d 342 (9th Cir. 1972). See also Mawson v. United States, 463 F.2d 29 (1st Cir. 1972) (court of appeals' disapproval of trial judge's refusal to allow prosecutor to make a recommendation); United States *ex rel.* Taylor v. Rundle, 456 F.2d 1245 (3d Cir. 1972) (trial judge rejected prosecutor's recommendation, but disposition of appeal based on ineffective assistance of counsel); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966) (pre-*Santobello*; trial judge reneged on promise he personally made to defendant).

The Supreme Court of Pennsylvania has adopted a rule that would permit a defendant to withdraw his plea if the judge rejects the bargain. PA. R. CRIM. P. 319(b)(3) provides in part: "If . . . the judge decides not to concur in the plea agreement, he shall permit the defendant to withdraw his plea." *But cf.* note 19 *supra*. See also ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(c)(iii) (approved draft 1972).

²⁵ United States *ex rel.* Martinez v. Mancusi, 455 F.2d 705, 707 (2d Cir. 1972); United States v. Frontero, 452 F.2d 406, 410-13 (5th Cir. 1971) (*dicta*).

²⁶ In the unreported opinion in United States *ex rel.* Mansour v. New Jersey, Civ. No. 1164-72 (D.N.J., Sept. 19, 1972), the trial judge in the state court rejected the prosecutor's recommendation. The district court refused to grant a habeas corpus petition, noting that the sentencing judge was not bound by the prosecutor's promises, and that defendant should have been aware of that fact. The court distinguished United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972), asserting that the prosecutor in that case guaranteed the recommendation would be accepted. In fact, the prosecutor in *Culbreath* only told the defendant that acceptance was "likely." The Third Circuit, No. 72-8091 (3d Cir., Jan. 8, 1973), denied Mansour a certificate of probable cause to appeal, and leave to docket out of time.

The retreat is a mistake. Although *Santobello v. New York*²⁷ holds only that a defendant must be permitted to withdraw his plea if the prosecutor fails to keep his part of a bargain, its rationale would also allow pleading anew when the judge does not accept the bargained-for sentence. Because plea bargaining is necessary in our system, the Court required "safeguards to insure the defendant what is reasonably due in the circumstances."²⁸ It could be argued that the defendant is deprived of nothing for which he has bargained as long as the prosecutor keeps his side of the bargain, but the prosecutor's recommendation is meaningful to the defendant only if it is accepted. The defendant, as was made clear in Casper's interviews, considers the prosecutor to be speaking for the judge and expects the judge to do whatever the prosecutor recommends. Therefore, even when the prosecutor promises only a recommendation, the defendant believes he is promising what the court will deliver. The essence of plea bargaining is that defendants forgo their right to trial in return for assurance of a lenient sentence. Defendants' expectations are dashed if such a sentence is not forthcoming;²⁹ they are confirmed in their impression that the criminal justice system is just another rough-and-tumble game with no fixed rules. The perception that police, prosecutors and judges are unprincipled is reinforced. It should follow that a defendant is reasonably entitled to acceptance of his bargain or the alternative right to plead anew. Moreover, should judges often reject prosecutorial recommendations, defendants aware of the situation would have a significantly reduced inducement to bargain. The value of plea bargaining in reducing judicial work would be correspondingly limited.³⁰ Eliminating the hypocrisy and sanctifying the bargain in guilty plea proceedings seem necessary corrective measures.

²⁷ 404 U.S. 257 (1971).

²⁸ *Id.* at 262.

²⁹ This would seem even more important when a defendant asserts innocence, purporting to plead guilty only to avoid an excessive sentence. *Cf.* *North Carolina v. Alford*, 400 U.S. 25 (1970).

³⁰ Some courts have intimated that although a defendant should be permitted to withdraw his plea prior to sentencing if either the judge or the prosecutor aborts the bargain, he should not be permitted to withdraw it on this ground after sentence is imposed. Such an approach would, of course, almost always preclude withdrawal due to a judge's failure to follow the bargain, since the defendant is unlikely to learn of the judge's decision until the time of sentencing. It would, therefore, in a manner we think inconsistent with *Santobello*, allow defendants to be deprived of that which they are "reasonably due."

There is merit to the argument that a court should not be burdened with a complaint filed several years after sentencing, claiming that the judge failed to implement a plea bargain. Proof, at that late date, of the facts surrounding the plea may be difficult for the state to muster, and fraud by defendants upon the courts could be accomplished easily. Moreover, it is not unreasonable to require a defendant to make such a claim within a limited time after sentence is pronounced: his realization that the bargain has been foiled should be immediate. To accommodate the state's interests, we suggest enactment for the state and federal systems of a procedural rule requiring that all such claims be brought within a year of sentencing. In addition, to protect this automatic waiver rule from constitutional attack, the waiver should be made "knowing and intelligent" by informing the defendant of the rule at the time sentence is imposed.

None of the above-suggested improvements would drastically alter the broad discretion presently given the prosecutor. Other reforms have been suggested that aim directly at that goal. Unjustified disparities in sentencing, undue emphasis on bargaining weapons such as pretrial incarceration, and unchecked prosecutorial freedom to dispose of cases as the prosecutor alone sees fit have led commentators to favor internal plea bargain standards for the prosecutor's office, and greater participation by the judge in the bargaining process.³¹ Both proposals are premised on the assumption that it would be desirable to eliminate from plea bargaining the possibility of some defendants faring much better than others for reasons unrelated to the underlying justice of the situation. Casper's findings suggest that defendants, on the other hand, see no particular unfairness in the inequities. They accept inequity as part of the game. The findings even suggest that the inequities are not as great as commentators have assumed; particularly significant is Casper's conclusion that defendants with retained counsel fared no better on the whole than indigents who were left to the mercy of the public defender.

Despite the doubts cast by Casper's findings, it would seem desirable to purge plea bargaining of irrational inequities. But we think promulgation of prosecutorial standards and inclusion of the judge in the bargaining would not be desirable measures for achieving that goal. Even if standards are established and the judge knowingly implicates himself in thrashing out a bargain, the defendant will still perceive criminal justice as a game—perhaps slightly more principled, but a game nonetheless. Involvement of the judge in bargaining indeed could lower still more a defendant's appraisal of the justice of the system. Judges may not be viewed as impartial arbiters under the current system, but it is hard to believe their role as such would be enhanced were they to participate in striking a bargain. In our adversarial system, much value must be attached to maintaining the judge as the one impartial voice. Merely shifting from the prosecutor to the judge the task of establishing a bargain would be ineffective to correct inadequacies in the present system, and would be potentially damaging. The primary focus should be on eliminating the perception that the system is an unprincipled game, rather than on equalizing sentences, especially when disparities may be justified in the interest of rehabilitation.

Drastic reform is desirable. Eliminating altogether the plea bargain in its present form should be considered. Such reform has recently been suggested by the hardly radical National Commission on Criminal Justice Standards and Goals.³² Reform, however, must be reconciled with the legitimate functions of plea bargaining. Most importantly,

³¹ See, e.g., White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).

³² N.Y. Times, Jan. 15, 1973, at 1, col. 1.

some inducement to plead guilty must be retained in order to prevent a flood of trials. That inducement need not be in the form of a bargain. Worth consideration is a system in which defendants who want to plead guilty (many of Casper's defendants were quite willing to admit they had committed the charged offense) would be guaranteed, by statute, that their freedom would be restricted for no longer than a prescribed period if they pleaded guilty. Having pleaded guilty before a judge in a proceeding where the primary judicial concern was voluntary acknowledgement of commission of the charged offense, the defendant could be sentenced by a separate agency of the court which, within statutory limits, would determine the restrictions to be placed on the defendant. Restrictions could be based largely on his prospects for rehabilitation. The inducement to plead guilty would be provided by mandatory confinement of defendants found guilty after trial for a period longer than the maximum permissible restriction for one who pleads guilty. Determination of the maximum permissible period of incarceration for those who plead guilty and the minimum permissible period of confinement for those convicted after trial would require careful consideration of deterrent and retributive needs, but it is a task that seems best suited for legislative action.

The advantages of a statutory framework seem significant. The prosecutor would be removed from his central role as the man who determines punishment; his bargaining superiority would be eliminated. An agency specially designed to take into account rehabilitative factors would handle the sentencing task. Discouraging studies about the ability of existing institutions to rehabilitate criminals³³ might make one skeptical of supposed expertise in such an agency, but it is hard to imagine that the agency would be less able to cope with the problem than the prosecutor now is. Sentencing inequities would at least be confined to disparities within the statutory framework—and would be based on rational determinations.

The crucial improvement would be to eliminate the game of bargaining from the judicial process. A defendant would still face a choice of whether or not to plead guilty, but that choice would not be based on how good a deal he could obtain, but, in most cases, on whether he acknowledged guilt. If Casper's subjects are typical, most defendants admit guilt and want help. Under the proposed system, the agency would exist to fashion that help. Even if defendants were skeptical about their disposition before the agency, the statutory limits would guarantee a maximum permissible restriction on their freedom that would be less than the required penalty for those found guilty after trial, thus retaining the inducement to plead guilty.

The man who asserts his innocence would, it is true, still feel some

³³ See Wilson, *If Every Criminal Knew He Would Be Punished if Caught*, N.Y. Times, Jan. 28, 1973, § 6 (Magazine) at 9.

pressure to plead guilty in order to avoid the higher statutory minimum sentence after trial. But that coercive influence, built into the present system, would probably not be increased, and would be inevitable in any workable system.³⁴ The judge receiving the guilty plea would remain free to reject it if he did not believe the defendant's avowal of guilt. It can be anticipated that a judge would take this responsibility more seriously under the proposed system, as he would no longer be given the added responsibility of sentencing.

Of great value under the proposed system would be the elimination of a particularly disturbing aspect of plea bargaining, the prosecutor's reduction of the charge in order to induce the plea. Casper found that the alleged rehabilitative value of the admission of guilt is absent in the present system. That value was compromised because defendants did not take their admissions seriously, viewed them only as tools to win low penalties, and often pleaded guilty to a crime different from the one they committed. We would at least be taking a step in the proper direction and facilitating the fulfillment of the rehabilitative function if we required that the guilty plea be entered on the basis of the crime actually committed.

Proper safeguards could be established to eliminate charge reduction. The easiest safeguard would entail having the prosecutor state whether he ever considered a more serious charge and whether the facts might justify a greater charge. Affirmative misrepresentations would likely not come as easily to the prosecutor as they have in the past to criminal defendants. The judge could also examine the evidence presented at the preliminary hearing, if one had been held. Furthermore, if the system is restructured with the specific goal of eradicating plea bargaining, we ought to assume that prosecutors will follow the guiding principles.

In approaching the plea-bargaining issue from the perspective of Casper's book, it is easy to fall into the trap of believing the only goal of the criminal system is rehabilitation of wrongdoers. That is certainly an inadequate perspective. The criminal system also exists to deter others from criminal acts, to separate the innocent from the guilty, to satisfy society's retributive needs, and to provide a mechanism for confining dangerous men. These ends cannot be forgotten. A system that formally adjudges men guilty of the crime they actually committed seems necessary to fulfill society's deterrent and retributive needs. The severity of the penalty and application of the "correct" label to the criminal, do have some deterrent effect. Furthermore, formal pronouncement that a man has committed an act that society strongly

³⁴ Since the Supreme Court has sustained the constitutionality of plea bargaining in its present form, the proposed system, with no greater coercive effect, should be safe from attack. *See Santobello v. New York*, 404 U.S. 257 (1971); *Brady v. United States*, 397 U.S. 742 (1970).

disapproves is necessary to adequately satisfy retributive instincts. The plea bargain subverts these goals.

The guilty plea process has received much attention in the recent past. Casper's study reinforces the conclusion that plea bargaining lies at the heart of the American criminal justice system. Surgery is needed. We should begin with minor reform to purge the process of its most obvious signs of decay and end with a transplanted inducement structure in place of the corrupting bargain. Eugen Ehrlich was probably correct in stating that:

The State as an organ of society protects against those that are outside the pale of society The conviction is steadily gaining that the only serious weapon against crime is the possibility of regaining the criminal for human society and thus subjecting him to social restraints.³⁵

We cannot, however, have effective social restraint unless potential criminals internalize the principles underlying the law and the social fabric. This they are impeded in doing by the perversities of the present system.

We think the description of this impediment is Casper's primary contribution. We recommend the book to students of the criminal justice system. Although Casper has left the rest of us with the difficult task of devising reforms, his book may help stimulate the demand necessary to get that task underway.

³⁵ E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (W. Moll transl. 1936).

